Inside: The Douglas-Black Dissent on The Immunity Law and Jennings Perry on Kefauver

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While Russia Moves Toward Political Freedom, We Stage Red Raids

Why Not Move Stalin's Mummy to Brownell's Washington?

To the objective observer in the uncommitted lands of the earth it must have seemed last week that the U.S.A. and the U.S.S.R. were beginning to exchange political systems. In Russia, *Pravda* for the first time gave authoritative confirmation of the anti-Stalinist views Krushchev was reported to have expressed. *Pravda* accused Stalin of "monstrous" excesses in his latter years. Stalin's terror began with the murder of Kirov in 1934, a murder which Trotzky blamed on the Soviet secret police. The murder frightened Stalin into a series of executions and political trials which made a farce of the 1936 Constitution. But now comes word from Leningrad, where Kirov was party leader, that at the Kirov museum in that city the murder is no longer blamed (as in the Great Soviet Encyclopaedia) on "a Trotzkyite degenerate," but only on "an enemy of the people," identity and motive unknown. A new view of Kirov's murder must lead to a new view of the Left and Right opposition to Stalin and that in turn to a new attitude toward the right of opposition.

The Giant That Fears A Mouse

This historic moment when the Soviet Union is turning toward political and intellectual freedom could be a moment of triumph for America. It is a moment for magnanimity in foreign policy and for example in democratic behavior. Instead we saw an act of frantic folly—the nationwide "income tax" raids on Communist party headquarters, the padlocking of the *Daily Worker*. The spectacle of the American giant rearing in fright before such a mouse as the harried Communist movement in this country must make us look ludicrous abroad. It must make us seem to be in the grip of forces much like those which ruled Russia under Stalin—an intense fear of "subversive" ideas, an insane suspicion of the opposition, a readiness to use any device to destroy opponents. In our milder fashion, we are continuing the practice of the "purge." Though so far only Communists have gone to jail, thousands of others have been reduced to second class citizenship, defamed, "exiled" internally (as in Russia), deprived of reputation and livelihood, held up to public contumely. This was Stalin's way with the opposition, and it is now ours. When the Russians come to the point of evicting Stalin's mummy from the Kremlin, perhaps they will send it here to the more congenial atmosphere of Brownell era Washington. We might in turn send them the Jefferson memorial; it may inspire them, at the moment it only embarrasses us.

In the same pattern with the Red raids was the Supreme Court's 7-2 decision upholding the new immunity law. This will allow dozens perhaps hundreds of persons to be brought before grand juries and Congressional committees in order to force them to inform on fellow radicals on grant of immunity from prosecution. They will be confronted with a choice of talking and running the possible gauntlet of a perjury frameup (where they really have nothing to tell) or to be silent and take a sentence for contempt (up to $1,000 fine or one year in jail) rather than inform. Of Mr. Justice Frankfurter's opinion for the majority one may say what Mr. Justice Holmes said in his most perceptive remark about the essence of adjudication. "General propositions," Mr. Justice Holmes said, "do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." Seven justices gave in to the tide of reaction; two (like Holmes and Brandeis in their time) stood out against it. From the rich warehouse of diverse judicial precedent, each side chose the rationalizations — those "general propositions" of which Holmes spoke—to buttress the judgment with which it started. This "law" from our national Sinai was only an exercise in piecing together the broken fragments of ancient tablets to suit individual preconceptions.

An Immunity That Does Not Immunize

For each general proposition put forward by Mr. Justice Frankfurter, there was a countervailing proposition at hand if the majority had chosen to use it. It is true that sixty years ago the Court held immunity laws constitutional, but sixty years ago it also ruled that segregation was constitutional. It is also true that for a century and a half in American and English law, the privilege has extended only to possible criminal prosecution and not to the disclosure of matters which would damage a man's reputation. But the Constitution, as Marshall said, was meant to endure and therefore to be adapted to changed circumstances. Our Congressional committees have revived the ancient practice of condemning men to "infamy." If the Fifth amendment privilege is to remain a reality, what good is an "immunity" which cannot protect a man from those non-criminal but no less terrible sanctions enforced against radicals—loss of rights to government employment, to work in defense plants, to labor on the docks, to travel. What good is an "immunity" which leaves the witness to be blacklisted? Which forces a man to inform on his family and friends?

America's Oldest Freedom

The majority chose to read the Fifth amendment narrowly in terms of a half century of precedents rather than broadly (as did Douglas and Black) in terms of its historic origin. Its

(*Continued on Page Four*)

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Like "Holmes and Brandeis, Dissenting" This Too May Some Day Become The Law

The Heart of The Douglas-Black Dissent on the Immunity Act

Mr. Justice Douglas (with Black) dissenting in Ullmann v. U. S.:

I would reverse the judgment of conviction. I would base the reversal on *Boyd* v. *United States*, 116 U. S. 616, or, in the alternative, I would overrule the five-to-four decision of *Brown* v. *Walker*, 161 U. S. 591, and adopt the view of the minority in that case that the right of silence created by the Fifth Amendment is beyond the reach of Congress.

Like Unlawful Search and Service

First, as to the *Boyd* case. There are numerous disabilities created by federal law that attach to a person who is a Communist. These disabilities include ineligibility for employment in the Federal Government and in defense facilities, disqualification for a passport, the risk of internment, the risk of loss of employment as a longshoreman—to mention only a few. These disabilities imposed by federal law are forfeitures within the meaning of our cases and as much protected by the Fifth Amendment as criminal prosecution itself. . . .

Boyd v. *United States, supra*, involved a proceeding to establish a forfeiture of goods alleged to have been fraudulently imported without payment of duties. The claimants resisted an order requiring the production of an invoice to be used against them in the forfeiture proceedings. The Court in an opinion by Mr. Justice Bradley sustained the defense of the Fifth Amendment. The Court said, "A witness, as well as a party, is protected by the law from being compelled to give evidence that tends to criminate him, or to subject his property to forfeiture." 116 U. S., at 638. . . .

Citizenship As Important As Property

The forfeiture of property on compelled testimony is no more abhorrent than the forfeiture of rights of citizenship. Any forfeiture of rights as a result of compelled testimony is at war with the Fifth Amendment.

The Court apparently distinguishes the *Boyd* case on the ground that the forfeiture of property was a penalty affixed to a criminal act. The loss of a job and the ineligibility for a passport are also penalties affixed to a criminal act. . . .

The Court may mean that if disqualification for government employment or ineligibility for a passport is a forfeiture within the meaning of the *Boyd* case, Congress has lifted these disabilities in exchange for the witness' testimony. Congress, I think, will be surprised to hear this. There is nothing in the legislative history that would suggest that Congress was willing to pay any such price for the testimony. If the disabilities which attach under existing law are forfeitures, the Court should strike down the Act. If Congress chooses to enact a new Immunity Act broad enough to protect against all forfeitures, it is free to do so. The Court seems to commit Congress to a policy that there is no indication Congress favors. . . .

Uncertainties Left to Litigation

The Court leaves all those uncertainties to another day, saying that the immunity granted by Congress will extend to its constitutional limits and that those constitutional limits will be determined case by case in future litigation. That means that no one knows what the limits are. The Court will not say. Only litigation on a distant day can determine it. . . .

(2) The guarantee against self-incrimination contained in the Fifth Amendment is not only a protection against conviction and prosecution but a safeguard of conscience and human dignity and freedom of expression as well. My view is that the Framers put it beyond the power of Congress to *compel* anyone to confess his crimes. The evil to be guarded against was partly self-accusation under legal compulsion. But that was only a part of the evil. The conscience and dignity of man were also involved. So too was his right to freedom of expression guaranteed by the First Amendment. The Framers, therefore, created the federally protected right of silence and decreed that the law could not be used to pry open one's lips and make him a witness against himself. . . .

(3) This right of silence, this right of the accused to stand mute serves another high purpose. Mr. Justice Field, one of the four dissenters in *Brown* v. *Walker*, stated that it is the aim of the Fifth Amendment to protect the accused from all compulsory testimony "which would expose him to infamy and disgrace," as well as that which might lead to a criminal conviction. . . .

Designed To Protect Against Infamy

The Fifth Amendment was designed to protect the accused against infamy as well as against prosecution. A recent analysis by Professor Mitchell Franklin of Tulane illuminates the point. See The Encyclopediste Origin and Meaning of the Fifth Amendment, 15 Lawyers Guild Rev. 41. He shows how the Italian jurist, Beccaria, and his French and English followers, influenced American thought in the critical years following our Revolution. The history of infamy as a punishment was notorious. . . .

The Beccarian attitude toward infamy was a part of the background of the Fifth Amendment. The concept of infamy was explicitly written into it. We need not guess as to that. For the first Clause of the Fifth Amendment contains the concept *in haec verba*: "No person shall be held to answer for a capital or otherwise *infamous* crime unless on a presentment or indictment of a Grand Jury . . . ." (Italics added.) . . . Beccaria, whose works were well known here and who was particularly well known to Jefferson, was the main voice against the use of infamy as punishment. The curse of infamy, he showed, results from public opinion. Oppression occurs when infamy is imposed on the citizen by the State. The French jurist, Brissot de Warville, wrote in support of Beccaria's position, "It is in the power of the mores rather than in the hands of the legislator that this terrible weapon of infamy rests, this type of civil excommunication, which deprives the victim of all consideration, which severs all the ties which bind him to his fellow citizens, which isolates him in the midst of society. The purer and more untouched the customs are, the greater the force of infamy." I Theorie des Loix Criminelles (1781) 188. . . .

The Penalties of Disclosure

There is great infamy involved in the present case, apart from the loss of rights of citizenship under federal law which I have already mentioned. The disclosure that a person is a Communist practically excommunicates him from society. School boards will not hire him. See *Adler* v. *Board of Education*, 342 U. S. 485. A lawyer risks exclusion from the bar (*In re Anastaplo*, 3 Ill. 2d 471, 121 N. E. 2d 826); a doctor, the revocation of his license to practice. Cf. *Barsky* v. *Board of Regents*, 347 U. S. 442. If an actor, he is on a black list. See Horowitz, Loyalty Tests for Employment in the Motion Picture Industry, 6 Stan. L. Rev. 438. And he will be able to find no employment in our society except at the lowest level, if at all. . . .

The Fifth Amendment stands between the citizen and his government. When public opinion casts a person into the outer darkness, as happens today when a person is exposed as a Communist, the government brings infamy on the head of the witness when it compels disclosure. That is precisely what the Fifth Amendment prohibits.

No Issues for The Next Two Weeks While I. F. Stone Goes Abroad

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What A Handshake Will Do: "Some Call It Corny, But People Seem to Like It"

Kefauver Just Hasn't Heard Democracy Is for the Birds

By Jennings Perry

Nashville, Tenn.—When the party's big mules moved in to stomp down Estes Kefauver's alarmingly strong bid for nomination at the last Democratic convention, a rueful helper at the candidate's headquarters scrawled a sign: "Nobody wants Estes but the people."

The stop-Kefauver swivit that began the other day immediately on the news from Minnesota—the flat editorial assumptions that "the bosses won't have it," the hurried shopping about for dark horses—suggests that the tall, brash Tennessean may again in '56 be stuck with nothing more than popular support.

Apart from the easy question of why the bosses are against the man, proved vote-getter that he is, it is pertinent to inquire why the people who take part in the primaries are spectacularly for him?

The answer is being whittled at on many facets, likely and unlikely. The probable nub is that the people like him for a certain old-fashioned quality: his corny persistence in believing in "the people," in the prerogative of citizens' choice.

Grandpa Was A Baptist Preacher

Kefauver's grandfather was a Baptist preacher, of a denomination that cleaves to the concept of free will. Kefauver himself is an almost primitive fundamentalist where democratic doctrine is concerned. No sooner had he arrived in the House in 1940 than he became one of the few Southern congressmen—one of two or three—to fight for Federal legislation to strike down the poll tax. In the Senate he has sought to ban filibusters, to break the dead hand of raw seniority precedence, to institute the election of congressional committee chairmen by the committees themselves. He has urged reform of the electoral college to provide a direct popular vote for President.

He has a naive, copy-book belief in the right of any man to "offer for office" and acts on this belief without timidity or mock-humility. The dyspeptic *Chicago Tribune* twits him with running "on nothing but his ambition." Neither Kefauver nor, apparently, a host of would-be sovereign voters considers candidacy in a republic a sinful presumption.

Actually this old, at least early-American fancy is one of the mystifying links between Kefauver and the wistful plebes. Cynical newsmen do not understand this; quite lowly citizens do. In a New Hampshire hamlet the gangling, bespectacled aspirant walks into the shoemaker's shop, saying, "I'm Estes Kefauver. I'm running for President." "For what?" "For President." "Good God," exclaims the astounded cobbler, "why did you come here?" It is a thing completely beyond his experience or expectation—but patently not beyond his liking.

"The Great Handshaker"

Owlish observers marvel at Kefauver's "technique," dub him the Great Handshaker. Indeed he has pumped millions of hands from one end of the land to the other—until his arm is corded. The device is not mere mumbo-jumbo: with Kefauver it is a means of communication man to man, worth a speech, or better. His doting admirers (and by now, no doubt, others as well) are convinced that "if only Estes could shake every hand, he would sweep all the polls."

And what has the man to communicate that seems to sit so well with so many? He is not a magnetic speaker, though he has a mountain-man's grace-note sense of humor and flair for rustic hyperbole; he is not part of a rabble-rouser, not much of an entertainer even. He has and projects above all a feeling of human kinship and sympathy. The man whose hand he has just gripped and to whom he has addressed only some ordinary remark often goes away persuaded he has met a person surely "for me," sometimes that he has touched fingers with a great man. Though in a hall he may put a fourth of his audience to sleep, the other three-fourths is apt to go away certain if not of his ability, at least of his sincerity.

An Unabashable New Dealer

Kefauver was and is an unabashable New Dealer: the term has not for him gone stale. He is a champion of the TVA—and other TVAs; he was against Taft-Hartley, has stood up for the civil rights programs—save FEPC. He was not even asked to sign the Manifesto, upholds the Court's ruling on equality in education as the law of the land and on principle, and defends as a first article of faith the right of every citizen to vote. His liberal positions have brought him under vociferous attack in his own State for "leftism." Yet only two years ago, after a primary race in which every dunged tab in the Bourbon lexicon was wasted on him, the people of Tennessee returned him to the Senate with an unprecedented majority.

His position—as a contender for the presidential nomination—on world questions has not been spelled out—perhaps not even yet thought out. As front runner now in the preference elections he will have to speak up. Last year he traveled in Russia and India, reporting to his own constituents that he found men everywhere "concerned for and working for peace and the improvement of their lot."

I am one of his constituents: I have known and watched him closely for twenty years. And I would ascribe his successes thus far in taking his ambitions to the man-in-the-street to a calculated audacity—hastening to explain the word "calculated" thus: "Because nobody can be that lucky."

FDR's Sense of Timing

He must be credited, I think, with an unusual ability to analyze the political circumstance, with something of Roosevelt's faculty of sensing the right time. In point, his decision to buck and break the storied Crump machine in 1949 when no other political figure in Tennessee suspected that the 20-year reign of the Memphis boss was ripe for a fall. In point also, New Hampshire in '52—and Minnesota in '56.

But "luck" or "perception" in these matters, there is little room to mistake his capacities in other, more personal equations, without which in the kind of campaign he makes, and his independence compels him to make, his national political career hardly could have gotten off the ground. First, the curious effectiveness of his unorthodox door-to-door and man-to-man canvassing of the electors, the rapport he seems to be able to weld with a handclasp. Second, his remarkable gift (a sort of hallmark of leadership) for attracting and holding fervent loyalty. His supporters tend to become disciples rather than followers, to become devoted to him as a "cause," and hence to tender him services that could not possibly be bought.

Even-tempered, deliberate, passably fatalistic, serene in his addiction to little d democracy, Kefauver has shown even the most skeptical that he is a terrific campaigner. Whether he is just the "perfect professional ham," as some have called him, or whether campaigning is second nature to him, may be debated. His stature as statesman is yet to be fully measured by events or by his own acts and pronouncements. Those most keenly for him privately even now cross their fingers on his chances of being "allowed" to win the Democratic nomination.

But though experiences has taught them to hedge—unwillingly—on this score, their frank estimation of the man himself, to which I subscribe, is that if elected he would be a good President.

Next Issue April 23 Will Be From Israel — After That (We Hope) From Moscow

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The Eastland Report on the Harry White Papers Deflates Itself

Is The Stage Being Set to Revive The "Twenty Years of Treason" Myth?

(*Continued from Page One*)

origin was in the revulsion of England against the English Inquisition which Elizabeth had launched and which forced dissenters and Catholics to go to jail or inform on their friends and families. It was this which drove the Pilgrim Fathers first to Holland and then to America. When the Supreme Court turned its back on the origins and spirit of the privilege, it turned its back on the oldest strand in the American tradition. It refused to read the privilege as a protection against our latter day Inquisition and our latter day public pillories as operated by Congressional committees and the Department of Justice. Of course, there are some real as well as imaginary dangers in the Communist movement, just as there were real as well as imaginary dangers that dissenter and Catholic might with foreign allies undermine the English Protestant throne. But the fundamental choice of a free society is whether to take the risks of freedom or the risks of repression; the risks of resolving the doubt against the accused or the risks of emphasizing the protection of the innocent. The choice made by the Court was philosophically the same choice made by Stalin—resolve the doubts in favor of the State, place "security" and "defense" ahead of the rights of the individual. It is this pollution of the atmosphere of American thought to which the Court has contributed. We believe that some day America will see the law as Douglas and Black see it in their dissent from which we publish excerpts on page two. The kind of revulsion which ruined McCarthy will some day sweep away this decision, too.

A Very Strange Coincidence

This revulsion would be hastened if there were fuller public knowledge of the circumstances and content of the report released last week by the Eastland committee on the Harry D. White papers. It was this committee, remember—the Senate Internal Security subcommittee—before which Herbert Brownell and J. Edgar Hoover launched the "twenty years of treason" campaign with an attack on a dead man unable to defend himself. By a very strange coincidence, the report was made available to the press over the preceding week-end for release on the very morning in which the papers were to carry the Supreme Court's decision on the immunity law appeal, brought by White's old associate, William Ludwig Ullmann. The decision and the report set the stage in an election year for revival of the twenty years of treason smear. But the report itself deflates the myth that Harry White was the center of a spy ring. For the committee ransacked White's private papers after they had been seized from his summer home by Louis Wyman, New Hampshire's witch hunting Attorney General.

They Found Nothing

Yet the committee did not uncover a single document which showed misconduct of any kind by the late Under Secretary of the Treasury. It is a ludicrous confession of failure when the Eastland committee devotes 70 of the 500 pages of the report to photostatic reprints of songs from some Soviet song books found in his library. It is also a confession—that there was "nothing there but us chickens"—when Eastland says coyly in his introduction, "Those who are looking"—in these papers—"for an array of informative witnesses regarding the inner workings of the Communist conspiracy are doomed to disappointment." In short, nothing was found. The sheer volume of private letters and memoranda reprinted cannot mask the trivial results of this gargantuan search through a dead man's personal effects.

Ullmann, faced with the choice of six months in jail or testing his word against Elizabeth Bentley's, can purge himself by going before a grand jury and answering the questions asked him in November 1954. If he talks, he will be saying again what he has several times told grand juries—that he never passed secret documents to Miss Bentley on Harry White's behalf or anyone else's. Perhaps the outcome may end by finally debunking in open court the story with which Miss Bentley has over and over again failed to persuade a grand jury to indict any of White's associates.

Don't Miss The Startling Special Announcement in the Box Below

Stone Going Abroad

I. F. Stone was scheduled to fly to London on March 30, the day after this issue went to press. He will write from Israel on the tense situation in the Middle East and then hopes to visit Moscow and report on the "democratic revolution from above" taking place in the Soviet capital.

Ordinarily this Weekly does not appear the last two weeks of August. Because of the Republican and Democratic conventions this year, which Stone will cover in person, the postoffice is permitting him to suspend for two weeks now instead in order to give him time to get abroad and write from there. The next issue will be that dated April 23 and it will be a full four page on-the-spot report from Israel which Stone knows well from six previous trips, on one of which he covered the Arab-Jewish war in 1948.

Next Report Will Be From Israel

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